UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TREZ CAPITAL (FLORIDA) CORPORATION, Plaintiff, -v- NOROTON HEIGHTS & COMPANY, LLC, Defendant.	20cv9622 (DLC) OPINION AND ORDER
NOROTON HEIGHTS & COMPANY, LLC, Counterclaim Plaintiff, -v- TREZ CAPITAL (FLORIDA) CORPORATION, Counterclaim Defendant.	

APPEARANCES:

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DENISE COTE, District Judge:

This action arises out of a contract dispute between the lender Trez Capital (Florida) Corporation ("Trez Capital") and the borrower Noroton Heights & Company LLC ("Noroton"). Noroton has moved to enforce its demand for a jury trial. Because the parties waived the right to a jury trial in their Loan Agreement, the motion is denied.

Background

The events underlying this action are described in an Opinion of August 23, 2021, which is incorporated by reference.[1] See Trez Cap. (Fla.) Corp. v. Noroton Heights & Co., LLC, No. 20-CV-9622 (AJN), 2021 WL 3727352, at *1 (S.D.N.Y. Aug. 23, 2021) ("Trez"). Trez Capital is a non-bank lender. Noroton obtained financing from Trez Capiral to renovate and redevelop a mixed-use shopping center in Darien, Connecticut (the "Project"). On November 15, 2019, Trez Capital and Noroton executed a Loan Agreement in the approximate amount of $45

[1] This action initially came before the Honorable Alison Nathan. It was reassigned to this Court on April 10, 2022.

million, secured by a mortgage lien recorded against properties involved in the Project.

The 76-page Loan Agreement provided that Trez Capital would disburse the loan to Noroton in two tranches. An Initial Funding Amount of $5.9 million would be advanced on the closing date of the Loan, and the remainder of the Loan would be disbursed "subject to Noroton's satisfaction of certain terms and conditions set forth in the Loan Agreement within 90 days of the Closing Date." Section 2.3.2 of the Loan Agreement set out thirteen conditions, defined as the Future Funding Requirements. In § 13.8, the parties agreed that New York law governs the "construction, validity, and enforceability of all Loan Documents and all of the obligations arising hereunder or thereunder."

Of particular relevance to this motion is § 13.11 of the Loan Agreement, which contains three dispute resolution waivers. Section 13.11 introduces the waivers with a prominent warning:

> Dispute Resolution. This section contains a jury waiver, arbitration clause, and a class action waiver. READ IT CAREFULLY.

There are four subsections to § 13.11. Subsection 13.11.1 reads:

> Jury Trial Waiver. As permitted by applicable law, you and we each waive our respective rights to a trial before a jury in connection with any Dispute (as

> "Dispute" is hereinafter defined), and Disputes shall be resolved by a judge sitting without a jury.

"Dispute" is not defined in the Loan Agreement. Section 1.4 of the Loan Agreement, entitled "Definitions," refers circularly to § 13.11: "'Dispute' shall have the meaning given to such term in Section 13.11.1 below."

None of the four subsections to § 13.11 describes an arbitration clause. Subsection 13.11.2 is described as "Intentionally Omitted;" § 13.11.3 is a class action waiver; and § 13.11.4 is a reliance waiver. The reliance waiver "certifies" that the parties have not represented "that the other party would not seek to enforce jury and class action waivers in the event of suit," and "acknowledges" that each party had been "induced to enter into this Agreement by, among other things, the mutual waivers, agreements, and certifications in this section."[2]

Upon execution of the Loan Agreement, Trez Capital disbursed the Initial Funding Amount to Noroton. It never advanced the remainder of the loan.

On March 9, 2020, Trez Capital formally notified Noroton that it had determined that Noroton had failed to meet five of

[2] Executed simultaneously with the Loan Agreement were eight related agreements between Trez Capital, Noroton, and Noroton's individual principals, who are referred to as the Guarantors. Each of the guaranties contained a waiver of the right to a jury trial.

the thirteen Future Funding Requirements, and that as a result Trez Capital would not disburse further funds. On July 2, 2020, Noroton repaid the Initial Funding Amount to Trez Capital in full, terminating the Loan Agreement pursuant to § 13.1, which reads: "This Agreement shall survive the making of the Loan and shall continue so long as any part of the Loan, or any extension or renewal thereof, remains outstanding."

On August 17, 2020, Noroton sent Trez Capital a letter alleging breach of the Loan Agreement and demanding damages. Trez Capital filed an action in New York state court in November 2020 seeking a declaratory judgment that it had not breached the Loan Agreement and reimbursement of its attorneys' fees and costs. Noroton removed the action to this Court on November 16, 2020, and Trez Capital filed its complaint on December 16. An Opinion of August 23, 2021 denied Trez Capital's motion to amend its complaint to add claims against Noroton's individual principals pursuant to the Limited Recourse Guaranty. Trez, 2021 WL 3727352, at *1.

Trez Capital filed an amended complaint on October 27, 2021. On November 27, Noroton filed its answer and counterclaims, demanded a jury trial, and moved to dismiss Trez Capital's claim for attorneys' fees and costs. The motion to dismiss Trez Capital's claim for attorneys' fees was granted on

April 28, 2022. Trez Capital (Florida) Corporation v. Noroton Heights & Company, LLC, No. 20cv9622 (DLC), Order of April 29, 2022.

On May 20, 2022, Noroton moved to enforce its jury trial demand as to four of its six counterclaims. The six counterclaims are for breach of contract, violation of the duty of good faith and fair dealing, promissory estoppel, unjust enrichment, negligent misrepresentation, and violation of the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. § 42-110a et seq. Noroton seeks a jury trial on its claims for breach of contract, good faith and fair dealing, and negligent misrepresentation, and under Connecticut law. The motion became fully submitted on June 28.

Discussion

I. Enforceability of the Jury Trial Waiver

The federal right to a jury trial is provided by the Seventh Amendment to the U.S. Constitution and is "preserved to the parties inviolate." Fed. R. Civ. P. 38(a). Rule 39(a)(2) provides that when a party demands a trial by jury, the action shall be designated as a jury action unless "the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist." Fed. R. Civ. P. 39(a)(2).

Because the enforceability of a jury waiver provision is a procedural issue, "[w]hen asserted in federal court, the right to a jury trial is governed by federal law." Merrill Lynch & Co. Inc. v. Allegheny Energy, Inc., 500 F.3d 171, 188 (2d Cir. 2007). "Although the right is fundamental and a presumption exists against its waiver, a contractual waiver is enforceable if it is made knowingly, intentionally, and voluntarily." Id. The burden of proving that a waiver was knowing and intentional rests with the party attempting to enforce the purported waiver. See Nat'l Equip. Rental, Ltd. v. Hendrix, 565 F.2d 255, 258 (2d Cir. 1977).

To determine whether a waiver of a trial by jury was knowing and voluntary, courts have considered the negotiability of the contract terms, the conspicuousness of the jury waiver provision, the disparity in bargaining power between the parties, and the business acumen of the party opposing the waiver. See id.; Morgan Guar. Tr. Co. of N.Y. v. Crane, 36 F. Supp. 2d 602, 603–04 (S.D.N.Y. 1999). This test is "less stringent than the 'intentional relinquishment or abandonment of a known right or privilege' test applicable to other constitutional rights." Bellmore v. Mobil Oil Corp., 783 F.2d 300, 306 (2d Cir. 1986) (citation omitted).

Consideration of all four of these factors demonstrates that Noroton knowingly, voluntarily, and intentionally waived its right to a jury trial. As an initial matter, the waiver is conspicuous and preceded by a prominent warning in all capital letters ("READ IT CAREFULLY"). The parties were fairly matched in sophistication and bargaining power. Both Noroton and Trez Capital are sophisticated business entities that were represented by counsel during negotiations.

Noroton contends that the ambiguity created by the absence of a definition of the contractual term "Disputes" renders the jury waiver entirely unenforceable. Relying on Express Indus. & Terminal Corp. v. New York State Dep't of Transp., 93 N.Y.2d 584 (1999), it argues that it could not have knowingly or voluntarily agreed to a jury waiver that was "impenetrably vague and uncertain." Id. at 590.

The parties' intention to waive their right to a jury trial in connection with disputes arising from the Loan Agreement is clear and unambiguous. The waiver was given prominence and is explicit. It cannot be fairly described as vague. The reliance waiver in § 13.11.4 underscores the importance of the waiver of the right to a jury trial to the parties. In that provision each of the parties acknowledges that it was "induced" to enter into the Loan Agreement by the waiver. The absence of a

definition for the term "Dispute" may impact the scope of the waiver, but it does not make the waiver itself unenforceable. To accept Noroton's argument, the Court would have to ignore a material term in a complex loan agreement between sophisticated parties. This it will not do.

II. Scope of the Jury Waiver

Noroton raises two additional arguments. It argues that the waiver did not survive the termination of the contract upon repayment of the loan in July 2020, and in the alternative that the scope of the waiver does not extend to its claim for negligent misrepresentation. Both arguments fail.

A. New York Contract Law

Under New York law, "a fundamental objective of contract interpretation is to give effect to the expressed intention of the parties." In re MPM Silicones, 874 F.3d 787, 795 (2d Cir. 2017). "Where the parties' intention is clear from the four corners of the instrument, no ambiguity exists requiring a factual inquiry into intention, and interpretation is a matter of law." Pharm. Soc. of the State of N.Y., Inc. v. Cuomo, 856 F.2d 497, 501 (2d Cir. 1988). "The best evidence of what parties to a written agreement intend is what they say in their writing." Tomhannock, LLC v. Roustabout Res., LLC, 33 N.Y.3d 1080, 1082 (2019) (citation omitted).

"The initial inquiry is whether the contractual language, without reference to sources outside the text of the contract, is ambiguous." In re MPM Silicones, 874 F.3d at 795. A contract is unambiguous if its "language has a definite and precise meaning about which there is no reasonable basis for a difference of opinion." Keiler v. Harlequin Enters. Ltd., 751 F.3d 64, 69 (2d Cir. 2014). "If a contract is clear, courts must take care not to alter or go beyond the express terms of the agreement, or to impose obligations on the parties that are not mandated by the unambiguous terms of the agreement itself." Torres v. Walker, 356 F.3d 238, 245 (2d Cir. 2004) (citation omitted).

To determine whether disputed contract language is ambiguous, a court must ask whether it is "ambiguous when read in the context of the entire agreement." Law Debenture Trust Co. of N.Y. v. Maverick Tube Corp., 595 F.3d 458, 467 (2d Cir. 2010) (citation omitted). "Where consideration of the contract as a whole will remove the ambiguity created by a particular clause, there is no ambiguity." Id. (citation omitted). In interpreting contracts, "words should be given the meanings ordinarily ascribed to them and absurd results should be avoided." Mastrovincenzo v. City of New York, 435 F.3d 78, 104 (2d Cir. 2006) (citation omitted).

B. Survival

Noroton argues that the jury waiver clause did not survive its termination of the Loan Agreement in July 2020 because the Loan Agreement did not contain an explicit statement that it would survive. Noroton points to the inclusion of survival language in other sections of the Loan Agreement. Those sections cover the parties' post-termination obligations with respect to outstanding expenses and indemnification in the event of third-party litigation.

The jury waiver applies to litigation between the parties arising from the Loan Agreement, whether filed before or after the termination of the Loan Agreement. The waiver applies to "any Dispute." Section 1.9 of the Loan Agreement instructs that "[t]he term 'any,' as a modifier to any noun, shall be construed to mean 'any or all' preceding the same noun in the plural." Thus, the jury waiver applies to any or all Disputes. A natural reading of this phrase includes disputes relating to the agreement whenever they arise. Here, although the lawsuit was filed after the termination of the Agreement, the dispute arose during the life of the Loan Agreement when Trez Capital refused to provide Noroton with additional funding for its purported failure to meet five Future Funding Requirements. Moreover, the reliance waiver in § 13.11.4 is not limited by time. It explains that the parties were induced to enter into the Loan

Agreement because of a jury waiver "in the event of suit." Of course, a dispute over the termination of an agreement may arise after its termination.

The survival clauses in the Loan Agreement address two issues -- the repayment of Trez Capital's expenses by Noroton and Noroton's promise to indemnify Trez Capital in litigation related to Noroton's use of the property and Noroton's development and sale of the property. There is no necessary or fair inference that the inclusion of a survival clause in those two circumstances must mean that no other obligations created by the Loan Agreement survive. This is particularly so with respect to an obligation that, as the Loan Agreement recognizes, induced the parties to enter the Loan Agreement.

Finally, Noroton relies on Pierson v. Empire State Land Assocs., LLC, 886 N.Y.S.2d 411 (2d Dep't 2009), to support its argument. In a brief order, the Second Department construed a lease cancellation agreement in the context of a personal injury action. It found that an obligation to indemnify did not survive the lease when the parties had identified certain obligations that did survive. Id. at 412. This case is inapposite. The parties here intended to waive their right to a jury trial in the event of a dispute related to the termination

of the Loan Agreement without any reference to when a lawsuit prompted by that dispute would be filed.

C. Negligent Misrepresentation

Finally, Noroton argues that the waiver does not extend to its claim for negligent misrepresentation because that claim arises out of conduct by Trez Capital that allegedly induced Noroton to enter the Agreement. In its counterclaim, Noroton alleges that Trez Capital misrepresented the security of the funds available for it to finance the entire loan amount.

The issues raised by this counterclaim go to the heart of the parties' contract. Noroton complains that Trez Capital unlawfully terminated the contract when it refused to fund the second tranche of the loan. There can be no legitimate dispute that any waiver of the right to a jury trial would include this core dispute over the termination of the Loan Agreement between the parties. Noroton's claim for negligent misrepresentation about the factual basis for that termination falls well within the broad scope of the jury waiver.

Conclusion

Noroton's May 20, 2022 motion to enforce its jury demand is denied.

Dated: New York, New York
July 5, 2022

DENISE COTE
United States District Judge